

Taking an important case to trial: jury research



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Earlier this year, we spoke with MoloLamken LLP partners Steven Molo, one of America's leading trial lawyers, and Sara Margolis, a rising courtroom star, to learn how a party in a high-stakes trial might improve its chances of success. We spoke with Steve and Sara again about a critical step in preparing for high-stakes trials: jury research.

What do you mean by jury research?

Steven: We work with a consultant – usually a psychologist – to identify the key issues in the case and understand juror attitudes toward them, by presenting evidence and arguments to mock jurors.

Sara: Research also helps us develop effective graphics and assess juror reactions to witnesses.

How does jury research work?

Steven: Research usually has two to four phases. It might start with a survey of potential jurors that's designed to reveal the beliefs that jurors will likely bring to their evaluation of the case. Next, we might move to a focus group that helps us understand how potential jurors would react to the particular facts and arguments. That may be a day-long exercise. Finally, we might move on to summary arguments or mock trials, where we present more developed arguments and evidence to the mock jury. These exercises might occur over two days.

Sara: Jurors complete questionnaires asking about their backgrounds and attitudes toward issues relevant to the case. They do this before, during, and at the end of exercises in which they are

presented evidence and arguments. Eventually they deliberate and following the deliberations the consultant moderates a discussion among them.

Is it realistic to think you can get valuable information in a one or two day exercise for a case that may take three or four weeks to try?

Sara: Yes. We are not trying the entire case to the mock jurors. Usually there will be modules that address specific topics – for example, damages or a particular defence. A day-long focus group may have five or six modules.

Who are the mock jurors?

Steven: Consultants recruit people in the venue who more or less represent the basic demographics found there. For example, race, gender, education, income level. The mock jurors look like the actual jury pool. The consultant pays them a daily fee that varies by venue.

Is the research confidential; can an opponent obtain it through discovery?

Sara: Jurors sign a confidentiality agreement. The work is protected by the work-product doctrine and is not discoverable. In the highly unlikely event that a mock juror was called to serve on the actual jury, they would be excused for cause.

When should you conduct research?

Steven: Certainly, when you have a solid picture of what the evidence may be – likely once there's a summary judgment ruling.

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Sara: But earlier research is often quite helpful. Surveys or focus groups done once a complaint survives a motion to dismiss can help focus discovery and develop themes.

You mentioned graphics. How does jury research help develop graphics?

Steven: Graphics are tremendously important. Some studies show 85% of communication is non-verbal, and more than 80% of people identify as ‘visual learners.’ People’s brains receive and process information and form beliefs quickly – through displays of information, not just spoken words.

Sara: We present graphics to the mock jurors. We ask them for feedback and use that feedback to hone our messages and themes. It takes time to reach a final product that best communicates a point.

Does jury research differ based on the venue?

Sara: To a degree. The general approach to jury research doesn’t change but, of course, the jury pool will. It can be advantageous to have a consultant with deep knowledge of a venue, but methodology is what’s most important.

You also mentioned trial presentation. How does jury research help with that?

Sara: Jury research can also help assess witness credibility. In civil cases, depositions are almost always videotaped so it’s easy to select a short representative excerpt. We can also do a short video of mock testimony. We can play these and learn how jurors react to specific witnesses. Their

reaction and advice from the consultant can be useful in improving a witness’ communication skills.

Can jury research help inform settlement?

Steven: It helps both a lawyer and a client understand how jurors are likely to react to the case. It might embolden a client to move forward to trial or settle within a given range. It can provide a reality check to a client with an overly optimistic or pessimistic view. Sometimes sharing a favourable research outcome – on a confidential basis – with an opponent can be useful in negotiations.

What are some common mistakes to avoid?

Steven: Ignoring bad evidence. You want to see how jurors respond to your opponent’s best evidence and arguments.

Sara: Focusing too much on the outcomes instead of what you learn along the way. It’s not about ‘winning’ the exercise. It’s about gathering and analysing information that will help you build a persuasive case and avoid mistakes at trial. ■